

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

Received
APR 15 2015
Copyright Royalty Board

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF
SOUND RECORDINGS (*WEB IV*)

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)
)
) Docket No. 14-CRB-0001-WR (2016-2020)
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)

**REPLY DECLARATION OF TODD LARSON
IN FURTHER SUPPORT OF MOTION IN LIMINE
TO EXCLUDE IMPROPER WRITTEN REBUTTAL
TESTIMONY AND ACCOMPANYING EXHIBITS**

1. I am counsel for Pandora Media, Inc. ("Pandora") in the above-captioned case. I am familiar with the facts, circumstances, and proceedings in this case and submit this Reply Declaration in further support of the Moving Services' Motion in Limine to Exclude Improper Rebuttal Testimony and Accompany Exhibits.

2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of a transcript of proceedings from the hearing in Docket No. 2006-1 ("*Satellite I*"), dated June 6, 2007.

3. Attached hereto as Exhibit B is a true and correct copy of an e-mail chain between counsel in Docket No. 2011-1 ("*Satellite II*"), dated June 4, 2012.

I hereby declare under the penalty of perjury that, to the best of my knowledge,
information and belief, the foregoing is true and correct.

Dated: April 15, 2015
New York, NY

 15/04/15

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Counsel for Pandora Media, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2015, I caused a copy of the foregoing document to be served by e-mail and first-class mail to the participants listed below:

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<p>William Malone 40 Cobbler's Green 205 Main Street New Canaan, Connecticut 06840 malone@ieee.org Tel: 203-966-4770</p> <p><i>Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.</i></p>	<p>Frederick Kass 367 Windsor Highway New Windsor, NY 12553 ibs@ibsradio.org IBSHQ@aol.com P: 845-565-0003 F: 845-565-7446</p> <p><i>Intercollegiate Broadcasting System, Inc. (IBS)</i></p>
<p>George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com Tel: 615-242-9999</p> <p><i>GEO Music Group</i></p>	

Reed Collins 1/24/04

Reed Collins

EXHIBIT A

Before the

COPYRIGHT ROYALTY BOARD

LIBRARY OF CONGRESS

Washington, D.C.

In the matter of:

Adjustment of Rates and Terms * Docket No.

for Preexisting Subscriptions * 2006-1

Services, * CKB DSTR

and *

Satellite Digital Audio Radio *

Services *

Room LM 408

Library of Congress

First and Independence

Avenue, S.E.

Washington, D.C. 20540

Wednesday,

June 6, 2007

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

APPEARANCES: (cont'd)

On Behalf of Music Choice:

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pfakler@mosessinger.com

1

3

6/6/2007 HEARING - Vendetti, Cook, Masiello, Karmazin (2006-1)

APPEARANCES:

On behalf of SoundExchange:

DAVID A. HANDZO, ESQ.

MICHAEL B. DeSANTIS, ESQ.

JARED O. FREEDMAN, ESQ.

THOMAS J. PERRELLI, ESQ.

MARK D. SCHNEIDER, ESQ.

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On behalf of XM Satellite Radio Inc.:

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JONATHAN BLOOM, ESQ.

TODD LARSON, ESQ.

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BRUCE S. MEYER, ESQ.

RALPH MILLER, ESQ.

of: Weil Gotshal & Manges

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On behalf of Sirius Satellite Radio

Inc.:

BRUCE G. JOSEPH, ESQ.

KAPYN K. ABLIN, ESQ.

MATT J. ASTLE, ESQ.

JENNIFER L. ELGIN, ESQ.

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bjoseph@wileyrein.com

6/6/2007 HEARING - Vendetti, Cook, Masiello, Karmazin (2006-1)

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Mark Vendetti				
By Mr. Miller	32			
By Mr. Schneider		7		
Stephen Cook				
By Mr. Meyer	44		153	
By Mr. Freedman		72		189
Anthony Masiello				
By Mr. Miller	194		242	
By Mr. Handzo		229		
Melvin Karmazin				
By Mr. Wyss	274			
By Mr. Handzo		329		
Exhibit No.		Description	Mark	Recd
XM				
6	Stephen Cook Testimony		47	48
7	Anthony Masiello Testimony		197	198
SoundExchange				
1				149
15	Satisfaction Study Report			136
17	June 2006 Messaging Study		75	81
18	XM Satellite Radio Change Lanes		91	101
21	XM Sat Radio Technical Overview		237	
22	Sirius contract with Fox News		350	353
23	Sirius contract with NASCAR		354	356
24	Sirius contract with NBA		356	357
25	Sirius contract with NBA Second Amendment		361	
Sirius				
1	Testimony of Melvin Karmazin		266	321
2	Chart		260	
30	Sirius 10-K form		279	
31	Sirius 10-Q form		279	

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1 continued with the original numbering scheme
2 with these exhibits, which I probably should
3 have done with the first two, and I take
4 responsibility for not having done, but that's
5 the reason.

6 BY MR. WYSS:

7 Q Mr. Karmazin, would you look at
8 Sirius Exhibit 30, which is the 10-K form.
9 And the simple question is, is it a true and
10 accurate copy of Sirius' 10-K for 2006?

11 A Yes.

12 Q And would you please look at
13 Sirius Exhibit 31. And is this a true and
14 accurate copy of Sirius' Form 10-Q for the
15 period ending March 31, 2007?

16 A Yes.

17 MR. WYSS: Okay. Your Honor, we
18 would offer Sirius Exhibit 31 and 30, at this
19 time.

20 CHIEF JUDGE SLEDGE: Any objection
21 to Exhibit 30?

22 MR. HANDZO: I'm sorry. Which one

1 351.4(b), which reads: "The written direct
2 statement shall include all testimony,
3 including each witness' background and
4 qualifications, along with all exhibits."
5 CHIEF JUDGE SLEDGE: Mr. Wyss?
6 MR. WYSS: Obviously, Your Honor,
7 this exhibit did not exist back in October.
8 This is in response to our understanding the
9 Court wanted current updated information.
10 This is a judicially noticeable document.
11 This is what we file with the SEC, which would
12 hopefully provide the Court with the most
13 recent information.

14 CHIEF JUDGE SLEDGE: Mr. Wyss,
15 some would be relieved to hear that the Court
16 feels bound by its own regulations. The
17 objection is sustained.

18 MR. WYSS: Thank you, Your Honor.

19 BY MR. WYSS:

20 Q Mr. Karmazin, within your written
21 statement, you discuss some of the satellite
22 risk-related factors that Sirius faced and

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1 is that, Your Honor? Is that the --

2 MR. WYSS: 10-K.

3 MR. HANDZO: Okay. Yes, Your
4 Honor. The Court's regulations require that
5 exhibits with direct testimony be submitted
6 with the written testimony; that is the
7 Court's regulation 351.4. And, moreover, I
8 would just note that in Mr. Karmazin's written
9 testimony, the recent 10-K 2006 was cited in
10 only one place, and only for the risk factor.
11 I haven't had a chance to go through this
12 document to see if there's even a change with
13 respect to the one thing that they cited that
14 for in his written testimony, so I would
15 object that, number one, it's not permitted by
16 the regulations. But, number two, I think
17 with respect to prejudice, it seems to me
18 they're just submitting numbers that weren't
19 even in his testimony.

20 CHIEF JUDGE SLEDGE: And to what
21 regulation are you referring?

22 MR. HANDZO: Your Honor, it's

1 faces. Could you briefly describe some of the
2 historic risks, very briefly, that Sirius had
3 to overcome in that respect?

4 A Well, I think the idea of
5 historically designing satellites, and once
6 again, creating satellites that are going to
7 work in a vehicle that's going significantly
8 fast on the roads, and also get into the
9 homes, and not be able to buy one off-the
10 shelf, I mean, I think that there was
11 significant risks then. But the one thing I
12 learned in the two and a half years that I
13 have been in the satellite business, is that
14 there's just lots and lots of risks associated
15 with satellites.

16 Q And do those risks continue even
17 today?

18 A The risks, absolutely, continue
19 today. When you have a satellite up in the
20 air, if something goes wrong, you really don't
21 have anybody, or at least I haven't found a
22 person that I can send up there to fix it.

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EXHIBIT B

Larson, Todd

From: Singer, Randi
Sent: Monday, June 04, 2012 2:08 PM
To: 'Freedman, Jared O'; 'Fakler, Paul M.'; Levin, Garrett A.; Rich, Bruce; Larson, Todd; 'Trokenheim, Matthew'; Perelman, Sabrina; 'Cunniff, Martin'
Cc: Handzo, David A; DeSanctis, Michael B
Subject: RE: SDARS/PSS II (trial rules)

Jared --

Since we aren't going to reach agreement on procedures with respect to objections on written testimony, it should not be included in any agreement between the parties. You are, of course, free to argue however you see fit.

Other than that, it seems we have some basic parameters to work with. Pursuant to them, shall we schedule a short call this evening to discuss objections to exhibits other than the written testimony itself?

And thank you for confirmation about witnesses and clients during the open.

Regards,
Randi

From: Freedman, Jared O [mailto:JFreedman@jenner.com]
Sent: Monday, June 04, 2012 1:48 PM
To: Singer, Randi; 'Fakler, Paul M.'; Levin, Garrett A.; Rich, Bruce; Larson, Todd; 'Trokenheim, Matthew'; Perelman, Sabrina; 'Cunniff, Martin'
Cc: Handzo, David A; DeSanctis, Michael B
Subject: RE: SDARS/PSS II (trial rules)

We are fine on Saturday/Sunday and exchange of cross demonstratives.

We don't agree that parties must exchange objections to all or portions of written testimony the night before. We reserve our rights to raise such objections at the hearing.

We agree to having witnesses and clients at openings, except of course to the extent there may be discussion of Restricted information which would require them to leave the hearing room for that part of the openings.

From: Singer, Randi [mailto:randi.singer@weil.com]
Sent: Monday, June 04, 2012 1:37 PM
To: Freedman, Jared O; 'Fakler, Paul M.'; Levin, Garrett A.; Rich, Bruce; Larson, Todd; 'Trokenheim, Matthew'; Perelman, Sabrina; 'Cunniff, Martin'
Cc: Handzo, David A; DeSanctis, Michael B
Subject: RE: SDARS/PSS II (trial rules)

Jared --

I just left you a voice mail -- if you are in agreement with the changes below, we are ready to finalize these.

Thanks,
Randi



Randi W. Singer

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From: Singer, Randi
Sent: Monday, June 04, 2012 10:36 AM
To: 'Freedman, Jared O'; Fakler, Paul M.; Levin, Garrett A.; Rich, Bruce; Larson, Todd; Trokenheim, Matthew; Perelman, Sabrina; Cunniff, Martin
Cc: Handzo, David A; DeSanctis, Michael B
Subject: RE: SDARS/PSS II (trial rules)

Jared:

I still need to reserve our final sign-off, but in the interests of time, I am sending a few additional comments.

- In paragraphs 1 and 2, we've changed Saturday to Sunday as agreed and added a clarification that demonstratives on cross must also be exchanged.
- We've also deleted the last sentence of paragraph 1 in the interests of getting this done because we cannot agree to it.

In addition, we think witnesses (and clients) should be able to be present during openings, which are argument and not testimony. We think it is clear under the rules that this is permitted, but thought we should save time by agreeing in advance.

Thanks,
Randi



Randi W. Singer

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From: Freedman, Jared O [mailto:JFreedman@jenner.com]

Sent: Friday, June 01, 2012 4:42 PM

To: Singer, Randi; Fakler, Paul M.; Levin, Garrett A.; Rich, Bruce; Larson, Todd; Trokenheim, Matthew; Perelman, Sabrina; Cunniff, Martin

Cc: Handzo, David A; DeSanctis, Michael B

Subject: RE: SDARS/PSS II (trial rules)

Randi, Paul et al,

Per your request, I've created a clean version that I hope captures the various issues we've discussed. (Please of course confirm that for yourselves). I accepted the prior changes we previously agreed to. I added Paul's suggested edit from below. I added the last two sentences of Paragraph 1. I also added the second parenthetical in Paragraph 1 just as a point of clarification. One note – with respect to the last sentence of Paragraph 1, which we didn't discuss – our thinking is that in some instances whether we object to portions of a witness's written testimony may depend on what the witness says orally at trial, including on voir dire. So, rather than spending time now trying to craft a rule that would capture every contingency, we thought it would be easier not to get into it in advance and simply to allow parties to raise objections to portions of written testimony at the hearing (as has been done in prior cases). Finally, I added the last sentence of Paragraph 4, just as a clarification (which probably isn't even necessary).

1. On direct, parties are limited to using and admitting into evidence the written direct testimony, exhibits (and rate proposals) that have been exchanged with the written cases (or as corrected or amended testimony). Parties will identify (but need not exchange) the documents they plan to use on direct no later than noon the day before the witness testifies (or no later than noon on ~~Saturday~~ Sunday for documents to be used on Monday). Other than as requested or ordered by the Copyright Royalty Judges, Parties cannot use other documents on direct. Parties will also exchange any demonstratives by 7 pm the day before they are used at trial. The evening before each trial day (or, in the case of Mondays, at a mutually agreed upon day and time), the parties will participate in a short call during which the party crossing a witness the next day will identify the exhibits to be used on direct examination to which it is willing to stipulate as to authenticity and admissibility, and the party presenting a witness the next day will identify the exhibits to be used on cross-examination to which it is willing to stipulate as to authenticity and admissibility. ~~However, parties are not required during these calls to identify the portions of a witness's written testimony to which they may object as inadmissible.~~

2. On cross, parties must identify or exchange all documents and demonstratives to be used on cross (except documents used solely for impeachment) no later than noon the day before using the document on cross (or no later than noon on ~~Saturday~~ Sunday for documents to be used on Monday). Parties may identify (but need not exchange) documents previously exchanged in connection with parties' written direct cases; documents previously entered into evidence; and documents previously produced with bates numbers in discovery. If an opposing party does not possess a document that has been identified, it may request that document, and the identifying party will promptly provide such document. Parties must exchange all other documents by email or other means. Parties can try to admit such documents into evidence on cross. Per 37 CFR 351.10(g), on cross, parties may use, but not admit into evidence, documents not previously identified or exchanged as described herein solely to impeach a witness's testimony.

3. Parties will provide one week's advance notice to the court and other parties of the anticipated order of the witnesses who will testify the following week. Parties will work cooperatively with respect to witness scheduling.

4. A witness can talk to counsel and others on breaks during the witness's testimony until cross examination of the witness begins. Once cross begins, you cannot speak to your witness about his testimony until the testimony, including all re-direct and re-cross, is done. Also, 351.9(f) provides that a witness may not listen to testimony or review a transcript of prior testimony. For avoidance of doubt, that means that before a witness testifies, the witness cannot attend any live testimony or read a transcript of any SDARS/PSS II hearing testimony. However, before a witness testifies, the witness may read the written direct testimony and deposition transcripts of other witnesses to the extent permitted by the Protective Order. After a witness has testified at the direct case hearing, the witness may read a

transcript of any SDARS/PSS II hearing testimony. In the rebuttal phase, witnesses may review all prior testimony, subject to the Protective Order.

5. When using documents at trial, parties will provide each other party with two copies of the documents.

6. When a party uses a hard copy of a native file that was produced as Restricted, the hard copy will be marked as Restricted, pursuant to the Protective Order.

From: Freedman, Jared O [mailto:JFreedman@jenner.com]

Sent: Friday, June 01, 2012 4:42 PM

To: Singer, Randi; Fakler, Paul M.; Levin, Garrett A.; Rich, Bruce; Larson, Todd; Trokenheim, Matthew; Perelman, Sabrina; Cunniff, Martin

Cc: Handzo, David A; DeSanctis, Michael B

Subject: RE: SDARS/PSS II (trial rules)

Randi, Paul et al,

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1. On direct, parties are limited to using and admitting into evidence the written direct testimony, exhibits (and rate proposals) that have been exchanged with the written cases (or as corrected or amended testimony). Parties will identify (but need not exchange) the documents they plan to use on direct no later than noon the day before the witness testifies (or no later than noon on Saturday for documents to be used on Monday). Other than as requested or ordered by the Copyright Royalty Judges, Parties cannot use other documents on direct. Parties will also exchange any demonstratives by 7 pm the day before they are used at trial. The evening before each trial day (or, in the case of Mondays, at a mutually agreed upon day and time), the parties will participate in a short call during which the party crossing a witness the next day will identify the exhibits to be used on direct examination to which it is willing to stipulate as to authenticity and admissibility, and the party presenting a witness the next day will identify the exhibits to be used on cross-examination to which it is willing to stipulate as to authenticity and admissibility. However, parties are not required during these calls to identify the portions of a witness's written testimony to which they may object as inadmissible.

2. On cross, parties must identify or exchange all documents to be used on cross (except documents used solely for impeachment) no later than noon the day before using the document on cross (or no later than noon on Saturday for documents to be used on Monday). Parties may identify (but need not exchange) documents previously exchanged in connection with parties' written direct cases; documents previously entered into evidence; and documents previously produced with bates numbers in discovery. If an opposing party does not possess a document that has been identified, it may request that document, and the identifying party will promptly provide such document. Parties must exchange all other documents by email or other means. Parties can try to admit such documents into evidence on cross. Per 37 CFR 351.10(g), on cross, parties may use, but not admit into evidence, documents not previously identified or exchanged as described herein solely to impeach a witness's testimony.

3. Parties will provide one week's advance notice to the court and other parties of the anticipated order of the witnesses who will testify the following week. Parties will work cooperatively with respect to witness scheduling.

4. A witness can talk to counsel and others on breaks during the witness's testimony until cross examination of the witness begins. Once cross begins, you cannot speak to your witness about his testimony until the testimony, including all re-direct and re-cross, is done. Also, 351.9(f) provides that a witness may not listen to testimony or review a transcript of prior testimony. For avoidance of doubt, that means that before a witness testifies, the witness cannot attend any live testimony or read a transcript of any SDARS/PSS II hearing testimony. However, before a witness testifies, the witness may read the written direct testimony and deposition transcripts of other witnesses to the extent permitted by the Protective Order. After a witness has testified at the direct case hearing, the witness may read a transcript of any SDARS/PSS II hearing testimony. In the rebuttal phase, witnesses may review all prior testimony, subject to the Protective Order.

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6. When a party uses a hard copy of a native file that was produced as Restricted, the hard copy will be marked as Restricted, pursuant to the Protective Order.

From: Singer, Randi [mailto:randi.singer@weil.com]

Sent: Thursday, May 31, 2012 6:24 PM

To: Fakler, Paul M.; Freedman, Jared O; Levin, Garrett A.; Rich, Bruce; Larson, Todd; Trokenheim, Matthew; Perelman, Sabrina; Cunniff, Martin

Cc: Handzo, David A; DeSanctis, Michael B

Subject: RE: SDARS/PSS II (trial rules)

Subject to final agreement on language for number 3, I think we have an agreement. Can you please circulate a clean version that embodies the final rules?

Thanks,
Randi

From: Fakler, Paul M. [mailto:Fakler.Paul@ARENTFOX.COM]

Sent: Thursday, May 31, 2012 6:19 PM

To: Freedman, Jared O; Singer, Randi; Levin, Garrett A.; Rich, Bruce; Larson, Todd; Trokenheim, Matthew; Perelman, Sabrina; Cunniff, Martin

Cc: Handzo, David A; DeSanctis, Michael B

Subject: RE: SDARS/PSS II (trial rules)

With respect to number 3, how about something like "Other than as requested or ordered by the Copyright Royalty Judges," to the beginning of number 1?

Paul M. Fakler
Partner

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From: Freedman, Jared O [mailto:JFreedman@jenner.com]

Sent: Thursday, May 31, 2012 3:09 PM

To: Singer, Randi; Levin, Garrett A.; Rich, Bruce; Fakler, Paul M.; Larson, Todd; Trokenheim, Matthew; Perelman,

Sabrina; Cunniff, Martin
Cc: Handzo, David A; DeSanctis, Michael B
Subject: RE: SDARS/PSS II (trial rules)

Randi, Paul and Sabrina,

Following up on our call yesterday.

1. On the issue of stipulating to authenticity and admissibility of exhibits – how about we agree to have a short call each evening at 7:30 pm or so where the party crossing the next day's witness identifies the exhibits it is willing to stipulate to, and the party presenting the next day's witness identifies the cross documents (previously identified by the crossing party) it is willing to stipulate to. That approach would seem to address your concern about saving some time at trial.
2. In the spirit of cooperation, we're willing to accept your proposal that parties disclose demonstratives by 7pm the day before they're used.
3. On Paul's point about amending exhibits, could you please propose some revised language that tracks what Paul said yesterday on the phone?

Thanks.

Jared

From: Singer, Randi [<mailto:randi.singer@weil.com>]
Sent: Wednesday, May 30, 2012 4:11 PM
To: Freedman, Jared O; Levin, Garrett A.; Rich, Bruce; fakler.paul@arentfox.com; Larson, Todd; Trokenheim.Matthew@arentfox.com; Perelman, Sabrina; Cunniff.Martin@ARENTFOX.COM
Cc: Handzo, David A; DeSanctis, Michael B
Subject: Re: SDARS/PSS II (trial rules)

Can I call you at 4:30?

From: Freedman, Jared O [<mailto:JFreedman@jenner.com>]
Sent: Wednesday, May 30, 2012 04:01 PM
To: Singer, Randi; Levin, Garrett A. <GLEvin@jenner.com>; Rich, Bruce; Fakler.Paul@ARENTFOX.COM <Fakler.Paul@ARENTFOX.COM>; Larson, Todd; Trokenheim.Matthew@arentfox.com <Trokenheim.Matthew@arentfox.com>; Perelman, Sabrina; Cunniff.Martin@ARENTFOX.COM <Cunniff.Martin@ARENTFOX.COM>
Cc: Handzo, David A <DHandzo@jenner.com>; DeSanctis, Michael B <MDeSanctis@jenner.com>
Subject: RE: SDARS/PSS II (trial rules)

Are we talking now?

From: Singer, Randi [<mailto:randi.singer@weil.com>]
Sent: Wednesday, May 30, 2012 10:21 AM
To: Freedman, Jared O; Levin, Garrett A.; Rich, Bruce; Fakler.Paul@ARENTFOX.COM; Larson, Todd; Trokenheim.Matthew@arentfox.com; Perelman, Sabrina; Cunniff.Martin@ARENTFOX.COM
Cc: Handzo, David A; DeSanctis, Michael B
Subject: RE: SDARS/PSS II (trial rules)

Jared --

Can we talk this afternoon? I'm available after 2 pm and I think we can get this more or less settled.

Regards,
Randi

From: Freedman, Jared O [<mailto:JFreedman@jenner.com>]

Sent: Friday, May 25, 2012 1:06 PM

To: Singer, Randi; Levin, Garrett A.; Rich, Bruce; Fakler.Paul@ARENTFOX.COM; Larson, Todd; Trokenheim.Matthew@arentfox.com; Perelman, Sabrina; Cunniff.Martin@ARENTFOX.COM

Cc: Handzo, David A; DeSanctis, Michael B

Subject: RE: SDARS/PSS II (trial rules)

Hi Randi,

1. Paragraph 1 – We are not prepared to stipulate that we will not challenge the authenticity or admissibility of exhibits and testimony. Glad to discuss if we might be able to reach a more narrow agreement with respect to authenticity.
2. Paragraph 1 – We're not sure what you mean about amending exhibits. Could you please clarify?
3. Paragraph 1 - 7pm seems too late notice for demonstratives. Could we compromise at 3pm?
4. Paragraph 4 – We're inclined to stick with the rule on sequestering witnesses, including experts, until after they have testified.

We'd be glad to discuss any and all of these issues early next week (including Monday). Even if we can't agree on every issue, our email exchange suggests that we agree on a lot, so hopefully we can at least memorialize the issues on which we agree.

Thanks.

Jared

From: Singer, Randi [<mailto:randi.singer@weil.com>]

Sent: Tuesday, May 22, 2012 4:18 PM

To: Levin, Garrett A.; Rich, Bruce; Freedman, Jared O; Fakler.Paul@ARENTFOX.COM; Larson, Todd; Trokenheim.Matthew@arentfox.com; Perelman, Sabrina; Cunniff.Martin@ARENTFOX.COM

Cc: Handzo, David A; DeSanctis, Michael B

Subject: RE: SDARS/PSS II (trial rules)

Dear Jared & Garrett --

Here are the Services' comments and proposed changes to the trial rules:

1. On direct, parties are limited to using and admitting into evidence the written direct testimony, exhibits (and rate proposals) that have been exchanged with the written cases. The parties stipulate that they will not challenge the authenticity or admissibility of any written direct testimony or of any exhibits that have been exchanged with the written direct cases in a timely manner. Parties will identify (but need not exchange) the documents they plan to use on direct ~~by~~ no later than noon the day before the witness testifies (or ~~by~~ no later than noon on Saturday for documents to be used on Monday). Parties cannot use other documents on direct except to the extent that an exhibit submitted with the written direct testimony needs to be amended in order to respond to an issue raised by the CRJs at the hearing, in which case the admission of such an amended exhibit would not be precluded by this agreement. Parties will also exchange any demonstratives by ~~noon~~ 7 pm the day before they are used at trial.

2. On cross, parties must identify or exchange all documents to be used on cross (except documents used solely for impeachment) ~~by~~ no later than noon the day before using the document on cross (or ~~by~~ no later than noon on Saturday for documents to be used on Monday). Parties may identify (but need not exchange) documents previously exchanged in connection with parties' written direct cases; documents previously entered into evidence; and documents previously produced with bates numbers in discovery. If an opposing party does not possess a document that has been identified, it may request that document, and the identifying party will promptly provide such document. Parties must exchange all other documents by email or other means. Parties can try to admit such documents into evidence on

cross. Per 37 CFR 351.10(g), on cross, parties may use, but not admit into evidence, documents not exchanged previously identified or exchanged as described herein ~~the day before~~ solely to impeach a witness's testimony.

3. Parties will provide one week's advance notice to the court and other parties of the anticipated order of the witnesses who will testify the following week. Parties will work cooperatively with respect to witness scheduling.

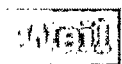
4. A witness can talk to counsel and others on breaks during the witness's testimony until cross examination of the witness begins. Once cross begins, you cannot speak to your witness about his testimony until the testimony, including all re-direct and re-cross, is done. Also, 351.9(f) provides that a witness may not listen to testimony or review a transcript of prior testimony. For avoidance of doubt, that means that before a witness testifies, the witness cannot attend any live testimony or read a transcript of any ~~Web III~~ SDARS/PSS II hearing testimony. However, before a witness testifies, the witness may read the written direct testimony and deposition transcripts of other witnesses to the extent permitted by the Protective Order. After a witness has testified at the direct case hearing, the witness may read a transcript of any ~~Web III~~ SDARS/PSS II hearing testimony. The parties agree that, notwithstanding the foregoing, experts shall not be subject to the provisions of 37 C.F.R. sec. 351.9(f) and instead shall be permitted to attend live testimony or read a transcript of any SDARS/PSS II hearing testimony.

5. When using documents at trial, parties will provide each other party with two copies of the documents.

6. When a party uses a hard copy of a native file that was produced as Restricted, the hard copy will be marked as Restricted, pursuant to the Protective Order.

If it makes sense to schedule a call to discuss, please let us know.

Regards,
Randi



Randi W. Singer
Weil, Gotshal & Manges LLP
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New York, NY 10153
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+1 212 310 8152 Direct
+1 212 310 8007 Fax

From: Levin, Garrett A. [<mailto:GLEvin@jenner.com>]

Sent: Thursday, May 17, 2012 6:13 PM

To: Freedman, Jared O; Fakler, Paul M.; Trokenheim, Matthew; Rich, Bruce; Meyer, Bruce; Larson, Todd; Singer, Randi; Cuniff, Martin; Perelman, Sabrina

Cc: Handzo, David A; DeSanctis, Michael B

Subject: RE: SDARS/PSS II (trial rules)

All –

With trial now less than three weeks away, we were hoping to re-engage on the issue of trial ground rules. Item #2 below outlines the rules were used in the Webcasting III case and that we circulated previously.

Thanks,

Garrett

From: Freedman, Jared O

Sent: Monday, March 26, 2012 3:57 PM

To: Fakler, Paul M.; Trokenheim, Matthew; Rich, Bruce; Meyer, Bruce; Larson, Todd; Singer, Randi

Cc: Handzo, David A; DeSanctis, Michael B; Levin, Garrett A.

Subject: SDARS/PSS II

All,

I wanted to raise 2 issues:

1. Under the Discovery Schedule and 37 CFR 351.7, the parties are supposed to hold a post-discovery settlement conference no later than March 30, 2012, and then file a joint settlement report with the CRB. How would each of you like to handle that, i.e., should we do calls between outside counsel, or were you thinking that client representatives would speak directly? Either way, I think it makes sense for us (SoundExchange) to speak to each of you (SXM and MC) separately. Relatedly, we sent you an ephemerals proposal a while back, and I remain hopeful we can resolve that issue before trial.

2. As Garrett and I briefly discussed with Randi a couple of weeks ago, it may make sense to try to agree on some trial rules. The regulations address these issues to some degree. Below are trial rules that we agreed on with counsel in the Webcasting III case. We thought they worked pretty well, and we propose them for this case, though we're always open to improvements.

1. On direct, parties are limited to using and admitting into evidence the written direct testimony, exhibits (and rate proposals) that have been exchanged with the written cases. Parties will identify (but need not exchange) the documents they plan to use on direct by noon the day before the witness testifies (or by noon on Saturday for documents to be used on Monday). Parties cannot use other documents on direct. Parties will also exchange any demonstratives by noon the day before they are used at trial.

2. On cross, parties must identify or exchange all documents to be used on cross (except documents used solely for impeachment) by noon the day before using the document on cross (or by noon on Saturday for documents to be used on Monday). Parties may identify (but need not exchange) documents previously exchanged in connection with parties' written direct cases and documents previously produced with bates numbers in discovery. If an opposing party does not possess a document that has been identified, it may request that document, and the identifying party will promptly provide such document. Parties must exchange all other documents by email or other means. Parties can try to admit such documents into evidence on cross. Per 37 CFR 351.10(g), on cross, parties may use, but not admit into evidence, documents not exchanged the day before solely to impeach a witness's testimony.

3. Parties will provide one week's advance notice to the court and other parties of the order of the witnesses who will testify the following week. Parties will work cooperatively with respect to witness scheduling.

4. A witness can talk to counsel and others on breaks during the witness's testimony until cross examination of the witness begins. Once cross begins, you cannot speak to your witness about his testimony until the testimony, including all re-direct and re-cross, is done. Also, 351.9(f) provides that a witness may not listen to testimony or review a transcript of prior testimony. For avoidance of doubt, that means that before a witness testifies, the witness cannot attend any live testimony or read a transcript of any Web III hearing testimony. However, before a witness testifies, the witness may read the written direct testimony and deposition transcripts of other witnesses. After a witness has testified at the direct case hearing, the witness may read a transcript of any Web III hearing testimony.

5. When using documents at trial, parties will provide each other party with two copies of the documents.

6. When a party uses a hard copy of a native file that was produced as Restricted, the hard copy will be marked as Restricted, pursuant to the Protective Order.

Thanks.

Jared

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